No. 1500

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COLUMBIA VALLEY RAILROAD COMPANY, a corporation

APPELLANT

V.

PORTLAND & SEATTLE RAILWAY COMPANY, a corporation

APPELLEE

On appeal from the Order and Judgment of the United States Circuit Court for the District of Washington

Brief of Appellant

W. W. COTTON
RALPH E. MOODY
For Appellant

JAMES B. KERR
For Appellee

IN THE

United States Circuit Court of Appeals For the Ninth Circuit

COLUMBIA VALLEY RAILROAD COMPANY,
a Corporation,
Appellant,

v.

PORTLAND AND SEATTLE RAILWAY COMPANY,
a Corporation,
Appellee.

Brief of Appellant

STATEMENT OF CASE

The appellant, the Columbia Valley Railroad Company, is a railroad corporation, organized as such, on the 16th day of February, 1899, for the purpose of building, equipping and operating a railroad from Wallula, on the south bank of the Columbia River, in the State of Washington, thence across the Columbia River at a point near Wallula, and thence by some eligible route along the north bank of the Columbia River, to a point in the State of Washington, on the Columbia River, at or near the mouth of the said river.

The line of appellant's railroad crosses over public

lands of the United States, and in December, 1899, appellant secured a right of way over said public lands by compliance with the act of Congress granting to railroads the right of way through public lands, approved March 3, 1875.

18 U. S. Statutes, 482;

2 U. S. Compiled Statutes, 1901, page 1568.

The sections of such act, pertinent to this inquiry, are sections 1 and 4, which are as follows, to-wit:

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

Section 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey

thereof by the United States, file with the Register of the Land Office for the district where such land is located a profile of its road; and, upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way; provided, that if any section of said road shall not be completed within five years after the location of said section the rights herein granted shall be forfeited as to any such uncompleted section of said road.

The appellee, the Portland and Seattle Railway Company, is a railroad corporation, organized for the purpose of constructing and maintaining a railroad from Spokane, Washington, down the north bank of the Columbia River to Vancouver, Washington, and thence to Portland, Oregon.

Appellee disputes the right and title of appellant's right of way over the said public lands, upon the ground that more than five years have elapsed since the location of the said right of way upon said public lands, and that the said railroad has not been completed within five years from the said location; and claims and pretends that under and by virtue of the provisions of the act of March 3, 1875, the right and title of appellant to the right of way over said public lands were and are forfeited; claims said alleged forfeiture under and by virtue of the provisions of Section 4, of said act of March 3, 1875; claims failure of appellant to complete its said railroad within the five years provided for in said act, and without any judicial or congressional action work such forfeiture; and

appellee further pretends and claims the right to go upon the right of way of appellant, and to build its railroad thereon, by virtue of various acts of Congress and by virtue of deeds from settlers of the land, made subsequent to appellant's compliance with the act of March 3, 1875; and the location of its road upon said public lands, all of which claims of appellee are fully set forth in appellant's Second Amended Bill of Complaint (Record, page), said Second Amended Bill of Complaint is hereby referred to and made part hereof for all purposes.

Subsequent to the securing and acquiring by appellant of its right of way over the public lands involved in this controversy, and subsequent to and with knowledge of the location upon ground of appellant's railroad, appellee wrongfully and without authority, and without the consent of the appellant, entered upon a part of the right of way secured by appellant over said lands, and attempted to make a location upon appellant's right of way and proceeded, wrongfully and without authority, to survey and locate a railroad, and to construct a railroad grade thereon; sent and placed men, teams and apparatus thereon, and engaged in excavating ground thereon; making fills, cuts and embankments, with intent to construct and operate a line of railroad over appellant's said right of way, destroying the use of the said right of way, so that appellant could not construct its railroad thereon. Appellant was at the time engaged in the construction of its railroad upon a portion of said right of way described in the said Amended Bill of Complaint, and appellee threatened to wrongfully enter in and upon that portion of the said right of way, which was then in the actual possession

of the appellant, and destroy the railroad grade of the appellant then being constructed and the portion completed, and make it impossible for the appellant to further construct its railroad upon its said right of way. Said several acts of trespass and threatened trespass are alleged in detail, in the Second Amended Bill of Complaint, which is hereby referred to and made a part of this statement. The acts of trespass of the appellee upon said right of way, and threatened trespass are continuing and destroying the right of way of the appellant, preventing it from constructing its line of railroad, to the appellant's irreparable injury and damage.

The Second Amended Bill of Complaint seeks to have the appellee restrained and enjoined from its said acts of trespass and threatened trespass.

Appellee filed a General Demurrer to appellant's Second Amended Bill, which was sustained by the Circuit Court; and appellant, refusing to further plead, but electing to stand upon its Second Amended Bill of Complaint, the Circuit Court entered a judgment against appellant dismissing the suit and awarding costs in favor of appellee, from which judgment appellant now appeals to this Court.

ASSIGNMENT OF ERRORS

I.

That the Circuit Court erred in holding that appellant's Second Amended Bill of Complaint failed to state facts sufficient to justify the interposition of a Court of Equity, and said Court erred in holding that appellant's remedy was at law.

II.

That the Circuit Court erred in sustaining appellee's demurrer to appellant's Second Amended Bill of Complaint.

III.

That the Circuit Court erred in making and entering an order sustaining appellee's demurrer to appellant's Second Amended Bill of Complaint.

IV.

That the Circuit Court erred in signing and entering a judgment in favor of appellee and against appellant, dismissing this cause and giving judgment in favor of the appellee.

POINTS AND AUTHORITIES

The grant of a right of way over the public lands of the United States by the act of March 3, 1875, was a grant in praesenti.

Railroad Co. v. Baldwin, 103 U. S. 426;
Bybee v. Ore. & Calif. R. R. Co., 139 U. S. 679;
N. P. R. Co. v. Hasse, 197 U. S. 10;
Wallula Pacific Ry. Co. v. Port. & Seattle Ry Co.,
— Fed. —

The first section of the act of March 3, 1875, contains words of present grant, but there is no definite grantee. A railroad company becomes specifically a grantee by filing its articles of incorporation and due proofs of organization under the same with the Secretary of the Interior.

Jamestown & N. Ry. Co. v. Jones, 177 U. S. 130.

The condition provided for in section 4 of the act of March 3, 1875, is a condition subsequent, and if a breach

of the condition occurs the estate will not revest in the grantor unless he takes advantage of the breach and makes an entry or its equivalent.

Schulenberg v. Harriman, 21 Wall. 44.

A breach of a condition subsequent does not ipso facto produce a revertor of title.

Ruch v. Rock Island, 97 U. S. 693-6;
Utah Etc. R. R. v. Utah Etc. Ry. Co., 110 Fed. 890;
Nickoll v. N. Y. & E. R. R. Co., 12 N. Y. 121;
Anderson et al. v. Boch, 15 How. 323.

No one can take advantage of the nonperformance of a condition subsequent annexed to an estate but the grantor or his heirs, or the successor of the grantor if the grant proceeded from an artificial person, and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee.

Southard v. Central R. R. Co., 26 N. J. L. 13.

The same doctrine obtains where the grant upon condition proceeds from the Government. No individual can assail the title which is conveyed on the ground that the grantee has failed to perform the condition annexed.

Schulenberg v. Harriman, 21 Wall. 44;
Van Wicks v. Knevals, 106 U. S. 360;
N. P. R. R. Co. v. Majors, 5 Mont. 136, 2 Pac. 332;
U. S. v. Will. Valley & C. M. Wagon Road, 55 Fed. 711;
Nickoll v. N. Y. & E. R. R. Co., 12 N. Y. 121;
Dewey v. Williams, 40 N. H. 222;
Shepherd's Touchstone, 149.

General demurrer admits the truth of the allegations of fact in the bill so far as the same are well pleaded.

1 Foster's Fed. Practice, Sec. 108;

1 Bates' Fed. Equity Procedure, Sec. 178.

Equity has jurisdiction by injunction to prevent and restrain trespass and interference with easements or property, or their disturbance or their destruction, actual or threatened.

Pomeroy's Equitable Remedies, Secs. 493-4-5 and 6, and 505;

Louisville & N. R. Co. v. Smith, 128 Fed. 1;

N. P. R. R. Co. v. Cunningham, 103 Fed. 718;

Am. Mill & Mining Co. v. Warren et al., 82 Fed. 522;

Burl. v. Schwarzmer, 52 Con. 181-4;

Stanford v. Stanford Horse R. Co., 56 Conn. 381-393;

N. Y. & N. H. & Hart. R. R. Co. v. Scovill, 71 Conn. 136-148;

U. S. Freehold & Emigration Co. v. Gallegos, 89 Fed. 769;

King v. Stewart et al., 84 Fed. 546;

Irwin v. Fulk et al., 94 Ind. 235;

Birmingham Traction Co. v. Sou. Bell T. & T. Co., 119 Ala. 144;

Edwards v. Hagaer, 180 Ill. 99-108.

Court of equity will grant an injunction restraining trespass, even though the title to property may be in dispute.

Cheesman et al. v. Shreve et al., 37 Fed. 36;

Wilson et al. v. Rockwell et al., 29 Fed. 674.

Parties have no right to take remedy into their own hands and seize property.

Western Un. v. St. Joseph & Wn. Ry. Co., 3 Fed. 430.

If possession of defendant is mere interruption of prior possession of plaintiff, interruption will be remedied by injunction if right is clear and certain without forcing plaintiff to establish title at law.

16 Am. & Eng. Ency. of Law, 2d Ed., 365;

In re Conway, 4 Arkansas 302;

Pokegama Sugar Pine Lbr. Co. v. Klamath River Lbr. & Imp. Co., 86 Fed. 528-533-534.

ARGUMENT

The Supreme Court of the United States has had occasion in several cases to consider the effect of grants of right of way, as compared with grants of land, and has uniformly held that an act of Congress containing words similar to those found in the first section of the act of 1875, referred to in the Statement of the Case, was a grant in praesenti, and took effect as against all intervening claimants, as of the date of the act, and that such grant granted a right of way over any public lands of the United States along the general route mentioned in the articles of incorporation, and that every person seeking to acquire title to such public lands after passage of the act took such lands subject to the possible right of the company to use the lands for right of way purposes.

Railroad Co. v. Baldwin, 103 U. S. 426;

Bybee v. Ore. & Calif. R. R. Co., 139 U. S. 679;

N. P. Ry. Co. v. Hasse, 197 U. S. 10.

The first section of the act of March 3, 1875, contains words of present grant, but there is no definite grantee. A railroad company, however, becomes specifically a grantee by filing its articles of incorporation and due proofs of organization under the same, with the Secretary of the Interior.

Jamestown & N. Ry. Co. v. Jones, 177 U. S. 130.

The first section of this act was construed by Judge Whitson, in the United States Court for the Eastern District of Washington, in the case of Wallula Pacific Ry. Co. v. Portland & Seattle Co., — Fed. Rep. —, wherein he holds as follows:

"Similar language to that used in this act, namely: 'the right of way to the public lands of the United States is hereby granted,' etc., has been uniformly construed by the Supreme Court as a grant in praesenti."

As the demurrer in this case admits that the appellant has taken the necessary steps in order to secure right of way over the public lands under the said act of March 3, 1875, it follows that the right of way of appellant over said public lands has been granted, and that the appellant is the owner thereof. It is likewise conceded that the appellant has complied with section 4 of the act of March 3, 1875, supra, and even though appellant's road was not completed within five years after location, or within five years after the filing and approval of its maps, the title to said right of way remains unimpaired in the appellant.

It is elementary that where an estate in lands vests under a present grant, subject to a condition subsequent, and a breach of the condition occurs, the estate will not

revest in the grantor, unless he takes advantage of the breach, and makes an entry or its equivalent.

Schulenberg v. Harriman, 21 Wall. 44.

A breach of a condition subsequent does not ipso facto produce a revertor of title.

Ruch v. Rock Island, 97 U. S. 693-6;

Utah Etc. R. R. Co. v. Utah Etc. Ry. Co., 110 Fed. 879;

Nickoll v. N. Y. & E. R. R. Co., 12 N. Y. 121;

Anderson et al. v. Boch, 15 How. 323.

Judge Hawley, in the case of Utah N. & C. R. Co. v. Utah & C. Ry. Co. et al., 110 Federal Reporter 879, in construing section 4 of the said act of March 3, 1875, observes on page 890:

"The Supreme Court of the United States has uniformly held, in construing various acts of Congress containing similar provisions to the act of 1875, that the failure to complete the road within the time limited is treated as a condition subsequent, not operating ipso facto as a revocation of the grant, but as authorizing the Government itself to take advantage of it, and forfeit the grant by judicial proceeding, or by an act of Congress resuming title to the lands."

Therefore, it becomes immaterial, so far as this cause is concerned, whether the appellant has committed a breach of the conditions of section 4. The appellee cannot question appellant's title upon that ground, as the Government has not. It is a fundamental rule of law that no one can take advantage of the nonperformance of a condition subsequent, annexed to an estate in fee, but the grantor or his heirs, or the successor of the grantor, if the

grant proceed from an artificial person, and if they do not see fit to assert their right to enforce a forfeiture on that ground the title remains unimpaired in the grantee.

Southard v. Central R. R. Co., 26 N. J. L. 13.

In Schulenberg v. Harriman supra, the Supreme Court, after announcing the foregoing rule, observes:

"The authorities on this point, with hardly an exception, are all one way from the Year Books down. And the same doctrine obtains where the grant upon condition proceeds from the Government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed."

Van Wicks v. Knevals, 106 U. S. 360;

N. P. R. R. Co. v. Majors, 5 Mont. 136, 2 Pac. Rep. 332;

United States v. Willamette Valley & C. M. Wagon Road, 55 Fed. 711;

Nickoll v. N. Y. & E. R. R. Co., 12 N. Y. 121;

Dewey v. Williams, 40 N. H. 222;

Shepard's Touchstone, 149.

Under the foregoing authorities there can be no question but that the appellant is the owner of and entitled to the possession of the right of way involved in this suit, and therefore the question which presents itself is: "Is the appellant, under the allegations of its Second Amended Bill, entitled to the relief prayed for?"

"Apellee by its demurrer admits the truth of the allegations of fact in the bill, so far as the same are well pleaded."

1 Foster's Fed. Practice, Sec. 108;

1 Bates' Fed. Equity Procedure, Sec. 178.

Appellee in this cause by its demurrer admits that the appellant is a railroad corporation duly and regularly organized as such for the purpose of constructing a line down the north bank of the Columbia River, and that it has complied with the act of March 3, 1875, and the rules and regulations of the Secretary of the Interior, and that it has secured and owns the right of way over the public lands referred to and described in said bill; it admits that the appellant has caused the central line of its railroad to be definitely surveyed and located on the ground over said land, and that the said central line of route was marked upon the ground by stakes such as are usually employed by surveyors of railroad lines, and that the appellant is in the actual possession of that portion of the right of way described in paragraph XIII of the said bill, and that it was at the beginning of this suit, is now and has been for some time prior thereto actually and actively engaged in the building and construction of a grade for its railroad thereover and thereon, and is now expending and has heretofore expended large sums of money in and for said construction, and has completed its grade upon a portion of its said right of way. It admits that the appellee on or about the 29th of December, 1905, through its officers, agents and employes, wrongfully and without authority of law, or the consent of the appellant, entered upon the right of way described in said amended bill, and that at the time it entered upon the same it knew that the appellant owned said right of way; that its maps of location had been filed and approved by the Secretary of the Interior, and that it had actual knowledge that the location of appellant's railroad was plainly and distinctly

marked upon the ground. It admits that it located its line of railroad upon appellant's right of way, and that it could have located its line in many places so as not to have materially affected or in any manner interfered with or injured appellant's right of way, but that appellee by deliberate act and design and intent so located its line that the same would not only conflict with appellant's location, but would prevent the use of the right of way so acquired by the appellant, by making it physically and financially impossible for appellant to construct a railroad upon its right of way. It admits that it made its attempted location and made it so that no other railroad could be located, constructed and operated in Skamania County, Washington, on the north bank of the Columbia River, except at a cost which would be prohibitory. It admits that the line of railroad located by appellant permits the construction of another line of railroad on the north bank of the Columbia River, and admits that the construction of a railroad on appellee's attempted location will prevent the building of another railroad on the north bank of the Columbia River. It admits that it is now wrongfully and without authority constructing a railroad grade on its said attempted location, and that it has placed on appellant's right of way its teams and apparatus and is engaged in excavating the ground thereon, and making fills, cuts and embankments, with intent to construct and operate a line of railway over said attempted location, and admits that it intends and declares that it will continue the said work of constructing its said railway on appellant's right of way from its beginning point to its ending point. It admits that it threatens and intends

and will, unless restrained, enter upon the right of way of appellant through its entire line for the purpose of constructing a railroad thereon, and for the further purpose of preventing appellant from constructing and operating a railway upon appellant's conceded right of way. It admits that its curves differ from appellant's curves, and that the height of its grade differs from the height of appellant's grade, and that the construction by appellee of its grade will greatly add to the expense of constructing a grade by appellee on its located line, and will in many places prevent the appellant from constructing, except at an expense which would be absolutely prohibitory. It admits that it is borrowing large quantities of material from appellant's right of way, using and threatening to use the material in the construction of its grade. It admits that said action and the use of said material will materially add to the expense of constructing appellant's grade, and in many places will cause an expense so great as to make the construction of a grade by appellant prohibitory. It admits that the work which it has already done will increase the expense of the construction of a railroad by appellant to a large amount of money.

Appellee also admits that unless restrained it intends and threatens to enter in and upon that portion of the right of way which is now in the possession of the appellant, and upon which appellant is engaged in constructing its grade for its railroad, and that appellee intends to enter upon the land and destroy and injure the said constructed grade of appellant, and prevent the appellant from building and constructing its grade thereon, to appellant's irreparable injury and damage. It admits

that it is continually trespassing and threatening trespass upon said right of way of appellant, and admits that unless restrained and enjoined it will continue its said trespasses and threatened trespass stated in said bill. It admits that appellant will be required to bring a multiplicity of suits against the appellee, its agents and employes, to prevent further injury, and admits that the appellant's injury cannot be compensated in damages, and the affidavits supporting the allegations of the bill are not denied.

In view of the foregoing facts it is apparent that the Court erred in sustaining the demurrer, denying the appellant the relief sought for, and in dismissing the suit.

"It is unquestionably settled that equity has jurisdiction by injunction to prevent the interference with easements or their disturbance or destruction, actual or threatened. This doctrine has been applied in a great variety of cases, such as preventing the diversion of water, preventing the obstruction of a private right of way, preventing the pollution of a stream, preventing the obstruction of a public right of way, etc., and in the prevention of obstructions or interferance with a railroad's right of way. Every disturbance of an easement, actual or threatened, will be restrained whenever, from the essential nature of the injury or from its continuous character, the legal remedy is inadequate. It is shown by the bill that the defendants are denying the right of the complainant to the right of way, and are insisting upon their right to cultivate the lands up to the ends of the cross-ties of the complainant's roadbed and track, and are denying the complainant the right to go upon the lands included in its right of way for the purpose of reconstructing its roadbed

and banks and cutting or repairing ditches therein as the same are needed in the proper maintenance and operation of the road."

Louisville & N. R. Co. v. Smith, 128 Fed 1.

"Courts of equity have always been open to suitors seeking preventive relief against wrongdoers who persist in committing trespasses of the kind which do permanently impair the value of real estate, whether the injury consists in the removal of minerals from mining lands, cutting down trees, digging the soil, or other kinds of mischief."

N. P. Ry. Co. v. Cunningham, 103 Fed. 708;

Am. Mill & Mining Co. v. Warren et al., 82 Fed. 522;

Pomeroy's Equit. Remedies, Secs. 493, 494, 495, 496 and 505;

Burlington v. Schwarzmer, 52 Conn. 181-4;

Stanford v. Stanford Horse R. Co., 56 Conn. 381, 393.

N. Y. & N. H. & Hart. R. R. v. Scoville, 71 Conn. 136-148.

The Circuit Court of Appeals, for the eighth circuit, makes the following observation:

"It is insisted on behalf of the appellees that the bill is insufficient, because it fails to show their insolvency, or irreparable injury to the appellant. It discloses a continuing trespass, however, upon the lands of the Freehold Company, by twenty-eight persons, and constant and wrongful diversion of water through those lands, which is continually depreciating their value. These facts, if

established—and they are admitted here—are certainly sufficient, on well-settled principles, to entitle the complainant to the relief it seeks. A continuing trespass upon real estate, or upon an interest therein, to the serious damage of the complainant, warrants an injunction to restrain it. A suit in equity is generally the only adequate remedy for trespasses continually repeated, because constantly recurring actions for damages would be more vexatious and expensive than effective."

U. S. Freehold Land & Emigration Co. v. Gallegos, 89 Fed. 769;

King v. Stewart et al., 84 Fed. 546;

Erwin v. Fulk Auditor et al., 94 Ind. 235.

The Supreme Court of Illinois in the case of Edwards v. Haeger, 180 Ill. 99-108, says:

"It is urged an injunction will not be granted to restrain a trespass. This is the rule as to a single act of simple trespass to property, but where a trespass has been committed and repetitions thereof are threatened, and the injury which follows such trespass is irreparable in damages, equity will interfere by injunction."

Birmingham Traction Co. v. Sou. Bell Tel. & Tel. Co., 119 Ala. 144.

A court of equity will grant an injunction restraining trespass, even though the title of the property may be in dispute.

Cheesman et al. v. Shreve et al., 37 Fed. 36;

Wilson et al. v. Rockwell et al., 29 Fed. 674.

The appellee had no right to take the law in its own hands and attempt to enter into the possession of prop-

erty which it knows to be claimed by another. Titles to property are not determined in this day and age by force, and in this respect the remarks of Judge McCrary in the case of

Wn. Union Tel. Co. v. St. Joseph & Wn. Ry. Co., 3 Fed. 430,

are very much in point as applied to the facts in this case. We quote from page 434:

"What I wish to emphasize in this case, as well as in other similar cases, is that the defendants have no right to take their remedy into their own hands. If they have the right to seize this property by force, upon the ground that they hold the contract void, according to the same reasoning the plaintiff would have the right to adjudge the contract valid, and by force retake the property. In other words, force and violence would take the place of law, and mobs would be substituted for the process of courts of justice. The strongest litigant, the one commanding the largest force of men and the most money, would succeed. Such a doctrine, if recognized by the courts as a proper mode of adjusting disputes concerning property rights, would lead at once to anarchy."

The appellant is not only entitled to an injunction restraining the appellee from trespassing upon the property in the possession of appellant and upon which it was building its railroad, but is also entitled to an injunction restraining the appellee from remaining upon that portion of the right of way which it had by force taken, and upon which it was attempting to construct its railroad line, to the destruction of the appellant's estate.

"If the possession of the defendant is a mere interrup-

tion of the prior possession of the plaintiff, the interruption will be remedied by injunction if the right is clear and certain without driving the plaintiff to establish his title by law."

16 Am. & Eng. Ency. of Law, 2d Ed., page 365.

It is admitted by the demurrer that appellant has secured the title to the right of way in question from the Government. It is likewise admitted that the appellant has located its line of railroad thereon by distinctly marking the same upon the ground, and was therefore in possession of the same. The facts show that the appellant's possession was simply interrupted by force exercised by appellee, and that therefore the appellant is entitled to the actual possession of the property, and the appellee should be restrained from entering thereon.

The case of

In re Conway, 4 Arkansas 302,

on this point is instructive, and we quote from page 344:

"It is true that the general principle is that the court will not by preliminary injunction change the possession of property and transfer it to complainant. But this is a rule to which there are and must be exceptions. If the possession of the defendant is a mere interruption of the prior possession of the plaintiff, that interruption will be removed by injunction, if the right is clear and certain without driving the plaintiff to establish his title at law."

, And we call attention also to the case of

Pokegama Sugar Pine Lbr. Co. v. Klamath River Lbr. & Imp. Co., 86 Fed. 528,

in which case Judge Morrow issued an injunction restraining acts of trespass, and also had occasion to determine

the right of the court of equity to, by injunction, take possession of property away from one who wrongfully obtained the same. We take the following quotation from page 533:

"It is contended that the injunction, although preventive in form, was mandatory in effect, its execution resulting in a change in the status of the parties. This contention assumes that the court will recognize the respondent as asserting, at the time the bill was filed, a claim of possession to the property under a color of right to such possession, and that the effect of the order was to oust it from that possession. But equity will not permit a mere form to conceal the real position and substantial rights of parties. Equity always attempts to get at the substance of things, and to ascertain, uphold and enforce rights and duties which spring from the real relations of parties. It will never suffer the mere appearance and external form to conceal the true purposes, objects and consequences of a transaction."

And again on page 534, the learned Judge further says:

"In other words, the respondent assumed to determine for itself that a forfeiture of the lease had been incurred; that it had thereby succeeded to large and valuable interests and improvements placed upon the property by the lessee and his assigns; and that it had by reason of such forfeiture acquired the right to re-enter, drive away the employes of the complainant, and maintain possession of the property by force and arms. A court of equity will not fail to see in such a possession a mere form to hide from view the unlawful character of the proceedings by

which the possession was gained, and, whatever may be the substantial rights of the parties in their true relation under the contract, the court will not give its sanction to such proceedings."

Under the foregoing authorities the appellant is entitled to the full measure of the relief it seeks, and therefore the judgment dismissing this cause should be reversed and the lower court directed to overrule the demurrer to the appellant's Amended Bill of Complaint, and to issue the injunction prayed for.

Respectfully submitted,

W. W. COTTON,

RALPH E. MOODY,

Attorneys for Appellant, Columbia Valley Railroad Company.